80-887

No. _____

Supreme Court, U. S.
FILED
DEC 2 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM F. BURNS AND THE RECTOR, WARDENS AND VESTRYMEN OF ST. MARK'S CHURCH IN ORANGE, NEW JERSEY,

Petitioners,

vs.

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, AND THE RIGHT REVEREND GEORGE E. RATH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the reliance by the courts below on sharply disputed expert testimony as to interpretations of prayers,* rituals, rubrics of the church prayer book and the construction of non-property church canons to determine which unit of church government has the ultimate power of control over the property of a local church involve the courts in "a searching and therefore impermissible inquiry into church polity" in violation of the First Amendment and the limitations set down by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), and *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976)?

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* Illustrative of the evidence considered relevant to the issue of control over local parish property is the following prayer, which was admitted into evidence, over objection, and interpreted by respondents' expert at trial:

> Vouchsafe O Lord, to be present with us, who are here gathered together with all humility and readiness of heart, to consecrate this place to the honour of thy great Name; separating it henceforth from all unhallowed, ordinary, and common uses; and dedicating it to thy service, for reading thy holy Word, for celebrating thy holy Sacraments, for offering to thy Majesty the sacrifices of prayer and thanksgiving, for blessing thy people in thy Name and for the performance of all other holy offices: accept, O Lord, this service at our hands, and bless it with such success as may tend most to thy glory, and the furtherance of our happiness, both temporal and spiritual; through Jesus Christ our blessed Lord and Saviour. (6T38-39; Da686).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

William F. Burns and The Rector, Wardens and Vestrymen of St. Mark's Church in Orange, New Jersey,*

Petitioners,

vs.

The Diocese of Newark, The Trustees of The Episcopal Fund and Diocesan Properties of the Diocese of Newark, and The Right Reverend George E. Rath,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

William F. Burns *et al.* respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered in this matter.

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of New Jersey in this case (Appendix A) and in its companion case *The Protestant Episcopal Church in the Diocese of New Jersey v. Graves, petition for cert. filed*

* The following persons were joined as individual defendants: William L. Wilkenson, Nicholas Bowness, William Clark, Ward Elliott, Sr., Robert A. Wacker, Lawrence Grimm, George Streisguth, William Wilkenson, Jr., Mathilde L. Yeomans, Paul Clarke, George Sengelaub, Martha Tant and Floyd Tomkins.

sub nom. Moore v. The Protestant Episcopal Church in the Diocese of New Jersey (October 21, 1980) (No. 80-675) (hereinafter referred to as "*Diocese of New Jersey*") are reported at 83 N.J. 594, 417 A.2d 31 (1980) and 83 N.J. 572, 417 A.2d 19 (1980), respectively. The opinion of the Superior Court of New Jersey, Chancery Division, is not reported (Appendix B). The opinions in *Diocese of New Jersey* are reproduced as Appendices A and B to the Petition for Writ of Certiorari in such case and references to such opinions in this Petition will be to such Appendices.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on July 24, 1980. The Order of the Supreme Court of New Jersey denying a timely petition for rehearing was entered on September 16, 1980 (Appendix C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

United States Constitution, Amendment XIV, Sec. 1:

> [n]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case presents the question whether the determination by the courts below that the Episcopal Church is hierarchical for property purposes, *i.e.*, that it has an "ultimate power of control more or less complete" (*Watson v. Jones*, 80 U.S. 679, 722 (1872)) over the property of local parishes, was the result of an impermissible delving by the civil courts into the polity and religious doctrines of the church organization.

The case arises in the context of a dispute over the ownership and control of property of a local church corporation which had been affiliated with a general church for many years prior to voting unanimously to sever its relationship with that general church. The record discloses what the dissenters below described as "sharp disagreement" among expert witnesses and the absence of any explicit provisions in the organic documents of either the general church or the local parish dealing with the issue of property control. Nevertheless, by making doctrinal decisions based upon interpretations of various provisions of church canons, rubrics of The Book of Common Prayer and customs and ceremonies of the Church, the courts below found there to be hierarchical control over property. The courts even considered, over objection, lengthy quotations of prayers and testimony as to the implications of these prayers with respect to the issue of property control.

How Federal Question Was Presented

Petitioners raised the issue of the impermissibility of delving into the polity and religious doctrines of the general church throughout all stages of this case. The argument was first made in petitioners' brief in opposition to

respondents' application for a preliminary injunction. At trial, petitioners objected to the admission of evidence dealing with prayers and other ecclesiastical and ritual matters, and specifically moved to dismiss at the end of respondents' case on the ground that respondents' own witnesses had conceded that the hierarchical nature of the Episcopal Church could only be determined on the basis of an extensive inquiry into doctrinal questions (2T127).[1] The issue was similarly pressed on the appeal to the Supreme Court of New Jersey.

Facts

The undisputed facts show that from its incorporation in 1827 as a New Jersey religious society, until its vestry (board of trustees) and members voted to disaffiliate in 1977, St. Mark's Church had been associated with the Episcopal Church in New Jersey.

During the period of this association, St. Mark's contributed funds to the general church and participated in general church activities, but at no time received financial support of any nature from the general church (Da298). All real property acquired by St. Mark's over the years was acquired free from any trust or any restriction in favor of the general church organization. With only one small exception involving $3,789, the personal property, trust and endowment funds of St. Mark's were also free of any trusts or reversions in favor of the general church (Da517).

Throughout its history, St. Mark's functioned as an independent church organization with respect to its business affairs. Its parish vestry made all decisions with

1. The seven volumes of trial transcript are referred to herein as 1T through 7T. The references to Da are to the four-volume appendix submitted by petitioners to the Supreme Court of New Jersey.

respect to the purchase or sale of property, contractual commitments, salaries paid to personnel, construction and renovation of church buildings and the general conduct of its financial activities (2T21-24; Da301-302; Da667-677). While St. Mark's often paid its diocesan assessments, the record discloses at least fourteen different occasions upon which St. Mark's refused to pay such levies, choosing to satisfy the financial obligations of the parish in preference to its obligations to the Diocese.

In June and July of 1977, the vestry and membership of St. Mark's voted overwhelmingly to terminate the affiliation of St. Mark's with the Episcopal Church (Da518; Da524). This decision was unanimously reaffirmed by both the vestry and the membership in September and October of the same year (5T10-14; Da526; Da529). Thereafter, St. Mark's became affiliated with The Anglican Catholic Church (formerly The Anglican Church in North America), a newly-formed national church organization composed in the main of more than 150 congregations which had also disaffiliated from the Episcopal Church.

The respondent Diocese refused to return to St. Mark's the funds which the Diocese through its Trustees of The Episcopal Fund and Diocesan Properties (the "Fund") was holding for the benefit of the parish. The Diocese then instituted suit seeking a determination by the civil courts that the properties of St. Mark's were held in trust for the benefit of the Diocese and through it for the use and benefit of the general church (Da13). The petitioners filed an answer and counterclaim denying the existence of any trust in favor of the Diocese or the general church and seeking the return of the more than $200,000 in investments held in the Fund and the quieting of title to the parish real estate (Da25-26).

Agreeing with petitioners' claim that there was a factual question whether the general church was hierarchical for property purposes, the trial court denied the respondents' motion for summary judgment and permitted the case to go to trial. A six-day trial was held in February and March of 1979. The basic facts surrounding the history of St. Mark's and its disaffiliation were not disputed; rather the focus of the trial was on the nature of the polity of the general church. Each party called experts in church history and canon law in support of its view of the nature of the polity of the church.

The witnesses for the Diocese conceded each of the following points:

(i) Neither the constitutions and canons of the national church nor of the Diocese contain any provisions establishing trusts of local parish property in favor of the general church or the Diocese (6T106-107);

(ii) No action had been taken by the general church with respect to the question of parish disaffiliation (2T5; 2T15-16; 2T74-75; 6T96-97);[2]

(iii) There was no understanding within the general church as to what happens in the event a parish withdraws, except that the canons of the general church no longer apply to a parish which has disaffiliated (2T75; 2T92-93);

2. Subsequent to the trial and almost coincident with the trial court's rendering of its decision in this case, on September 13, 1979, the general church, specifically citing the decision of this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), amended its national canons to create a trust "in all real and personal property held by or for the benefit of any Parish, Mission or Congregation" in favor of the general church and the diocese in which such parish, mission or congregation is located in the event of a disaffiliation.

(iv) A parish is free to legislate for itself on any matter as to which neither the general church nor the local diocese has acted (6T98);

(v) There are no sanctions for the non-payment by a parish of the quotas and assessments which finance general church and diocesan activities other than the loss by a non-paying parish of its vote at the diocesan convention (2T39-40);

(vi) The canons specifically leave the business of a parish to the vestry elected by its membership (Da 150); and

(vii) There are no procedures for review of the actions of a parish vestry or for removing or disciplining of vestry members acting contrary to the canons or directives of the general church (2T7-8; 2T17; 4T34-35; 6T116-117; Da150; Da301-302).

The parties presented contrasting expert testimony and documentary evidence as to the nature of the relationship between the dioceses and the parishes and the dioceses and the national church. Petitioners (the local parish) pointed to the "congregational" history of the Church and to the descriptions of the Church by prominent Episcopal commentators as a "federal commonwealth of 'parishes'" and as a "federation of independent parishes" (Da619; Da648; 3T5-6; 4T2-3; 6T80-82). The respondents conceded the "congregational" history of the Church in the United States (6T40), but attempted to show an evolution of the Church into a completely hierarchical body.

To demonstrate this evolution, respondents relied upon a series of documents relating to the ecclesiastical activities of the church, including sixteen separate forms dealing with appointments to the offices of lay reader, deacon and priest (Da542-556). Respondents' expert cited

as authority for his assertion that the parishes may not disaffiliate, the cumulative effect of canons relating to priests' vows, the requirement that vestry members be communicants, the alienation of consecrated churches,[3] repelling individuals from communion, the limitations on priests' officiating outside their parish boundaries and the ecclesiastical status of persons following dissolved or annulled marriages (6T149-150; 6T60; 6T69). In addition, respondents submitted evidence relating to the language of the vows taken by priests and the texts of the ceremonies and rituals of consecrating churches and instituting rectors into their parishes (4T73-74; 6T38-39; Da576-587). Respondents went so far as to present evidence dealing with the significance of "reserving the host" following communion (7T15-16).

While presenting their analysis as authoritative, respondents acknowledged that there is disagreement within the Church whether any body or person has the power to interpret questions of canon law in a definitive manner (6T100-101). Respondents also admitted that the sources of canon law include the constitution and canons of the church, the rubrics of The Book of Common Prayer and ancient ecclesiastical common law (6T107), and that a facial examination of the canons would not provide sufficient basis for defining the powers of the hierarchy (2T93-94).

Based on the testimony presented, the trial court found the general church to be of hierarchical polity with respect to both property and ecclesiastical matters. Peti-

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3. This canon was the only one cited by respondents which specifically dealt with property. The official Episcopal Church commentary on the canons of the Church introduced at trial described such canon as of "moral value" only and without legal significance (4T24-9).

tioners sought and obtained direct certification of the case by the Supreme Court of New Jersey so that it could be considered together with *Diocese of New Jersey*, which was then pending before that court.

The Supreme Court of New Jersey first decided *Diocese of New Jersey*. Unlike the case at bar, *Diocese of New Jersey* had been decided on cross-motions for summary judgment and so came before the court without a developed record. Based solely on the affidavits presented in that case, the court, by a 4-3 vote, found the Episcopal Church to be "a hierarchically structured organization which by virtue of its constitution and canons exercises pervasive control over its constituent parishes and missions." *Petition for Cert., Diocese of New Jersey*, App. A at A9. It further held that "it has been established that the Protestant Episcopal Church is a completely integrated hierarchical body . . . ." *Id.* at A10. The instant case was then determined to be controlled by the decision in *Diocese of New Jersey*. App. 5a.[4]

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4. St. Mark's originally incorporated under the New Jersey general religious corporation statute. It reincorporated in 1832 under an 1829 statute enacted to permit congregations to adapt to the "customs and usages" of the Episcopal Church. The 1829 statute specifically reserved to the affected religious corporations all of the "rights and privileges" accorded them under the general religious corporation statute, which included the right to acquire, hold and dispose of property free of external control.

It is apparent from both the majority and dissenting opinions that the New Jersey Supreme Court based its decision solely on its finding that the local parishes are subject to the control of the general church "as indicated in the constitutions and canon law of the national church and its dioceses." *Petition for Cert., Diocese of New Jersey*, App. A at A10. The reincorporation in 1832 was not relevant to the court's decision, because its use by the court to invalidate the congregation's corporate vote to disaffiliate would still have required a finding of hierarchical control, *i.e.*, a permanent surrender by the parish of its corporate power to

The three dissenting justices objected to the adoption by the majority of the *Watson* hierarchical deference option apparently left open by this Court in its opinion in *Jones v. Wolf*, 443 U.S. 595 (1979). The minority further argued that reliance upon *Watson* had involved the court in "an impermissibly extensive inquiry into church polity." *Petition for Cert., Diocese of New Jersey*, App. B. at A23. Citing the trial record in the instant case, the dissent pointed to the "sharp disagreement among experts on canon law and church history" as to the right of a parish to secede and take its property. *Id.* at A24.

Petitioners filed a timely motion for rehearing, requesting the court to consider the instant case on the basis of the record made at trial. That motion was denied on September 16, 1980. App. 15a.

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undo the decision which it had made in 1832. Indeed, the requirement of making this finding was specifically recognized by the trial court which grounded its decision on its conclusion that, "[b]ased on the documentary evidence and the testimony," the Episcopal Church is hierarchical. App. 13a. Further, the court would have had to deal with the petitioners' contention that the use of the 1829 statute to prevent disaffiliation would violate the "establishment clause" of the First Amendment. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This issue was never mentioned by the court.

REASONS FOR GRANTING THE WRIT

The courts below have violated the limitations set forth in *Jones v. Wolf*, and this Court should clarify the extent of inquiry into church polity that is permissible for the settlement of church property disputes.

In *Jones v. Wolf*, this Court left undefined the extent to which a civil court may inquire into church polity for purposes of locating the unit of government (*e.g.*, the local parish corporation or the general church body) which has "ultimate control over church property." 443 U.S. at 605. The trial record made in the instant case demonstrates that the lower courts exceeded all constitutional limitations in the scope of their inquiry, and such record illustrates the need for this Court to establish the guidelines to be applied to judicial inquiry into religious questions in the resolution of church property disputes.

Jones v. Wolf permits states to resolve church property disputes on the basis of the rule of compulsory deference to hierarchical decrees where the ultimate authority over the use of church property has been surrendered to hierarchical authority. Petitioners' theory of the case from the beginning was that by merely affiliating with a general church, St. Mark's Church did *not* surrender its inherent power as a New Jersey corporation to dispose of its property in accordance with the decisions of its board of trustees. It was, and is, petitioners' position that there is nothing within the Episcopal Church structure and the documents that reflect that structure which vests in the general church an "ultimate power of control more or less complete" over the property affairs of the local parish.

Both the majority and the dissent in *Jones v. Wolf* also recognized that the mere affiliation of a local congre-

gation with a hierarchically organized church did not in and of itself subject the local church's property to the control of the general church. Rather, as Justice Powell pointed out in the dissent, it is necessary to ascertain "where within the religious association the rules of polity, accepted by its members before the schism, had placed ultimate authority over the use of the church property." *Id.* at 618-619 (Powell, J., dissenting). In some cases, the authority may be in the hierarchy. In others, the authority may be vested in the congregation, as in the case of a congregational denomination or a denomination which is hierarchical for ecclesiastical purposes but congregational for property purposes. Adams & Hanlon, *"Jones v. Wolf": Church Autonomy and the Religion Clauses of the First Amendment,* 128 U. Pa. L. Rev. 1291, 1331-32 (1980); Boston, *Church Property Disputes: The Trend and the Alternative,* 31 Mercer L. Rev. 559, 577-78 (1980).

The issue in this case is how the seat of authority is to be determined. The majority in *Jones v. Wolf* stated that the pinpointing of the location of the source of authority requires an examination of the "polity and administration" of the church. According to Justice Blackmun:

> In some cases, this task would not prove to be difficult. But in others, the locus of control would be ambiguous, and "[a] careful examination of the constitutions of the general and local church, as well as other relevant documents, [would] be necessary to ascertain the form of governance adopted by the members of the religious association."

443 U.S. at 605 (quoting *Serbian Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 723 (1976)). Justice Blackmun and the majority concluded that such "a careful examination" would constitute an "impermissible inquiry into church polity." *Id.*

The analysis in *Jones v. Wolf* that the compulsory deference approach may be used *only* where the scope of the hierarchical authority is identifiable without "a searching and therefore impermissible inquiry into church polity," echoes the concurring opinion of Justice Brennan in *Maryland & Virginia Churches of God v. Church of God at Sharpsburg*, 396 U.S. 367, 369-70 (1970), in which he stated:

> [W]here the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy.

The record in this case presents precisely the type of situation adverted to by both Justices Blackmun and Brennan. The witnesses presented by the general church repeatedly conceded the absence of any church legislation with respect to a dissaffiliating parish and the lack of any clear statement of the authority of the hierarchy to restrict the power of a parish with respect to its own property. Rather, respondents' expert witness proposed that the court infer hierarchical authority over local parish property from the interplay of various canons, such as those dealing with the right of a person repelled from communion to appeal to the bishop and the power of the bishop to determine the ecclesiastical status of persons whose marriages have been dissolved or annulled in the civil courts (6T69). Respondents specifically admitted that, though the bishops are the key figures in the hierarchical structure, the bishops' powers cannot be adequately described by a facial examination of the church canons (2T93-94). As the three dissenting justices in the New Jersey Supreme Court

pointed out, the respondents never identified "any constitutional provisions or canons that address the right of a local parish to withdraw, what happens to its property when that occurs, or who is authorized to resolve a property dispute when a local body secedes." *Petition for Cert., Diocese of New Jersey,* App. B at A23.

Actual religious doctrine was, however, presented to the courts by respondents as a suggested basis for finding the general church to be the locus of control over property. Respondents' witness quoted extensively from prayers taken from the church liturgy and offered interpretations of those prayers to show that they demonstrate hierarchical control over property. Thus, over objection, the prayer quoted in the footnote to the Question Presented on page i of this Petition was read in its entirety into the record. The prayer was interpreted by respondents' expert as demonstrating that a building, once consecrated as an Episcopal church, always remains consecrated to that denomination. Similarly, the service for instituting a priest into his parish was read into the record and placed into evidence for purposes of demonstrating hierarchical control over personal property (4T71-75; Da576).

At another point in the proceedings, the respondents introduced evidence with respect to the practice of "reserving the host."[5] The stated purpose of this testimony was to show a religious veneration for particular items and thus the religious significance of the general church retaining legal control over parish property (7T15-17).

Apparently in reliance upon the testimony as to doctrine offered by respondents, the trial court and the New

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5. The practice involves preserving for future sacramental use consecrated wafers which have not been consumed during communion.

Jersey Supreme Court actually decided several issues of church law and doctrine which the general church itself had not decided. So, for example, the New Jersey Supreme Court interpreted the canon requiring diocesan consent to certain real estate transactions as proof of control over parish property. *Petition for Cert., Diocese of New Jersey,* App. A at A3, A11. Yet, not only did St. Mark's often fail to seek such consent, but the official annotated commentary to the general church constitution and canons, introduced at trial, states that, in the absence of any express agreement, the requirement of the canon can only be of "moral value and has no legal effect" (Da589).[6] The diocesan bishop himself stated that the canon was merely intended to "encourage" parishes to act "prudently" (2T11). Further, in holding the canon to have effect after disaffiliation, the court acted contrary to the statement of the diocesan bishop that the canons have no further effect upon a parish which has disaffiliated (2T75).

Similarly, the New Jersey Supreme Court interpreted the requirement to pay assessments as proof of diocesan control. Yet, the evidence at trial showed that St. Mark's had often refused to pay its assessments without any loss of control over its own affairs, and the church canons

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6. In *Diocese of New Jersey,* the companion to the instant case, the majority below commented that the provisions of *N.J.S.A.* 16:12-4, which require diocesan consent to parish real estate transactions, might serve as a neutral principle for finding for the general church. As noted in the dissent below to this case, such statute is inapplicable to St. Mark's because it was enacted after St. Mark's incorporation and because St. Mark's was incorporated before enactment of the first New Jersey statute reserving to the legislature the power to modify an existing corporate charter. App. 7a. *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819). In their brief to the Supreme Court of New Jersey, respondents conceded the inapplicability of the cited statute to St. Mark's.

themselves provide for loss of vote at the diocesan convention as the only penalty for non-payment of assessments.

Finally, both the trial court and the New Jersey Supreme Court explicitly declared the offices of wardens and vestrymen of St. Mark's vacant. App. 5a; 11a; 13a. Yet, respondents' witnesses conceded the absence of any provisions in the church canons for removal of vestrymen and wardens by the hierarchy (4T34-35), and that in fact there are no church judicatories with the jurisdiction to compel such removal (6T95-97). As noted by the dissenters below, "[e]ven if such a power [to remove wardens and vestrymen] exists, there is no showing that it has been exercised" by the general church in the instant case. *Petition for Cert., Diocese of New Jersey,* App. B at A21.[7]

Jones v. Wolf represents an important step in this Court's case-by-case development, since *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church,* 393 U.S. 440 (1969), of the guidelines applicable to the resolution of church property disputes. This case is the logical next step. Having permitted states to continue to apply the hierarchical deference test, so long as its application does not require a searching inquiry into church polity and doctrine, this Court must now define the scope of permissible inquiry. The instant case provides this Court with the record of a trial in which the basic inquiry was to determine whether authority over local church property had in fact been surrendered to hierarchical

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7. The New Jersey Supreme Court also cited the local parish's use of a standard prayer book and its adherence to changes in canons as further evidence of surrender of property control to the general church. *Petition for Cert., Diocese of New Jersey,* App. A at A3. The prayer book is exclusively ecclesiastical, and adherence to changes in canons is irrelevant in light of the admission that

authorities and offers the perfect setting for the establishment of the needed guidelines.[8]

The importance of this Court's setting down such guidelines is evidenced by the fact that approximately 25 church property disputes are heard by civil courts annually. Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 Harv. L. Rev. 1142, 1142 n.3 (1962). *See also* Annot., *Determination of Property Rights Between Local Church and Parent Church Body: Modern View*, 52 A.L.R.3d 324 (1973) (103-page review of church-property decisions). In addition, the issue is of great significance to many of the 150 or more churches which, like St. Mark's, have recently disaffiliated from or are in the process of disaffiliating from the Episcopal Church and are presently involved in litigation with such general church.[9]

If the issues raised by this case are not resolved and the boundaries for judicial inquiry into doctrine and polity

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there is no church legislation dealing explicitly with property control. Moreover, when the general church recently chose to change the prayer book, petitioners chose to disaffiliate.

8. While *Serbian Orthodox Diocese* also presented this Court with a detailed record, the issues involved were quite different. In *Serbian*, the question decided by this Court was not the power of the church to discipline its clergy, but the power of the civil courts to review the exercise of such power by the church. In the case at bar, the issue presented is whether in the first instance the general church has been given the power to control the local church's property, not how such power was exercised. As Justice White noted in his concurring opinion in *Serbian*, the determination of the power given to the church is "for the court's ultimate decision." *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. at 725 (White, J., concurring).

9. *See e.g., Bishop & Diocese of Colorado v. Mote*, Docket No. 80CA0406 (Colo. App. 1980); *Protestant Episcopal Church v. Barker*, Nos. C188907, C189571, C189572, C190652 (Cal. Super. Ct., filed February, 1977).

not established, each civil court dealing with one of these recurring church property disputes will find itself in the position of the courts below, that is, resolving actual doctrinal questions to determine the locus of authority over property. In the absence of sufficiently definite guidelines, "[s]tate courts willing to inject their own preferences regarding church polity often will be able, in the absence of an express provision regarding church property, to adopt the presumption reflecting their own predilections." Adams & Hanlon, *"Jones v. Wolf": Church Autonomy and the Religion Clauses of the First Amendment*, 128 U. Pa. L. Rev. 1291, 1335 (1980).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should issue a writ of certiorari to review and reverse the judgment and opinion of the Supreme Court of New Jersey.

Respectfully submitted,

By: /s/ Bruce D. Shoulson
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APPENDIX A

MAJORITY AND DISSENTING OPINIONS OF THE SUPREME COURT OF NEW JERSEY IN DIOCESE OF NEWARK v. BURNS

SUPREME COURT OF NEW JERSEY

A-134 SEPTEMBER TERM 1979

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND AND DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, and THE RIGHT REVEREND GEORGE E. RATH,

Plaintiffs-Respondents,

vs.

WILLIAM F. BURNS and THE RECTOR, WARDENS AND VESTRYMEN OF SAINT MARK'S CHURCH IN ORANGE, NEW JERSEY,

Defendants-Appellants.

Argued April 21, 1980—Decided July 24, 1980.

On certification to the Superior Court, Chancery Division.

Bruce D. Shoulson argued the cause for appellants (*Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan*, attorneys; *Bruce D. Shoulson* and *Robin A. Rolfe*, on the briefs).

Eugene M. Haring argued the cause for respondents (*McCarter & English*, attorneys; *Eugene M. Haring* and *Gita F. Rothchild*, on the brief).

Adrian M. Foley, Jr. submitted a brief on behalf of *amicus curiae* The Roman Catholic Diocese of Newark (*Connell, Foley & Geiser,* attorneys; *Robert J. Kelly,* on the brief).

The opinion of the Court was delivered by SULLIVAN, J.

This case is before us on certification of defendants' appeal pending unheard in the Appellate Division. 82 *N.J.* 268 (1979). The factual background and issues involved are almost identical to those considered in *The Protestant Episcopal Church v. Graves,* 83 *N.J.* 572 (1980), also decided today. Plaintiffs herein are the Diocese of Newark of the Protestant Episcopal Church (Diocese), the Trustees of the Episcopal Fund and Diocesan Properties and the Diocesan Bishop. Defendants are St. Mark's Church in Orange, New Jersey, its rector, wardens and vestrymen.

As in *Graves,* the essential facts are not in dispute. St. Mark's Church was originally incorporated in 1827 as "a congregation of Christians of the Protestant Episcopal church." In 1832, St. Mark's reincorporated under the act of February 17, 1829 entitled "An Act to incorporate religious societies worshipping according to the customs and usages of the Protestant Episcopal Church" and, pursuant to the provisions of that act changed its corporate name to "The Rector, Wardens and Vestrymen of St. Mark's Church in Orange, New Jersey."[1] Following the division of New Jersey into two dioceses of the Protestant Episcopal Church, St. Mark's became a part of the Diocese of Newark.

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1. In 1961 the corporate name was changed to read "West Orange" instead of "Orange."

St. Mark's acquired its first piece of property about 1828 and built its church on the site. Thereafter, additions were made to the church building and additional property acquired. St. Mark's now owns approximately three acres of land on which is located the church, rectory, a frame house and parish hall. Financing of the acquisitions and construction was by local funds only. None of the deeds of conveyance to St. Mark's make any reference to a trust in favor of the Diocese or the Protestant Episcopal Church.

Until 1977, St. Mark's, in accordance with Episcopal law, participated fully in Diocesan and Church activities. It sent delegates to the Diocesan Convention and regularly paid its Diocesan assessments and quotas. Following the enactment of the 1877 supplement to the laws regulating the affairs of the Protestant Episcopal Church, *L.* 1877, *c.* 56, now *N.J.S.A.* 16:12-4, St. Mark's, in conformity with the requirements of that statute, generally sought Diocesan consent to the transfer and mortgaging of its real estate.

Over the years, St. Mark's had received numerous donations and bequests of funds some of which were delivered to the Trustees of the Diocesan Episcopal Fund for management. It is undisputed that the funds belong to St. Mark's and that of the approximately $192,000 (at cost) presently held by the Trustees, only $3,788.98 thereof is subject to an express reversionary interest in favor of the Protestant Episcopal Church.

In 1977, as a result of the same doctrinal disputes as precipitated the *Graves* litigation,[2] the Wardens and Vestrymen of St. Mark's notified the Diocese that St. Mark's

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2. The disputes involved, *inter alia*, ordination of women to the priesthood and changes in the Book of Common Prayer.

was terminating its affiliation with the Diocese and the Protestant Episcopal Church. Pursuant to resolutions adopted by the vestry and congregation, St. Mark's affiliated itself with the Anglican Catholic Church, a denomination other than the Protestant Episcopal Church, and demanded the return of funds being held by the Diocese for the benefit of St. Mark's. Bishop Rath immediately "inhibited" defendant Rev. Mr. Burns, the Rector of St. Mark's, from performing priestly duties and thereafter deposed him. See *Graves* p. 575. A substitute priest was sent to St. Mark's by the Bishop but was refused admittance and denied permission to officiate at parish services. This suit followed. It sought an injunction against defendants prohibiting them from exercising control over parish property and a declaration that all property of St. Mark's was held in trust for the use and benefit of the Diocese of Newark and the Protestant Episcopal Church.

The case was tried over a period of six days, at the conclusion of which the trial judge ruled in favor of plaintiffs. He held that the individual defendants had no interest in the real or personal property of St. Mark's and "that title to all of said properties is in St. Mark's." The judgment also provided that the Rev. Mr. Burns, having been deposed as a priest of the Protestant Episcopal Church, was not entitled to the office of Rector of St. Mark's and that the other individual defendants, having renounced their affiliation with the Diocese and Church, were not entitled to vote or hold office in St. Mark's Church. Defendants were enjoined from exercising any control over parish property and prohibited from interfering with the use of the premises or with the conduct of the affairs of defendant corporation by plaintiffs or such persons designated by plaintiffs.

As noted, defendants' appeal was certified while pending unheard in the Appellate Division. Defendants' argument on appeal is similar to that made by the appellants in *Graves*. Defendants argue that such hierarchical structure as the Protestant Episcopal Church has, extends only to doctrine. In the absence of trust provisions, defendants claim that the authority of the hierarchy does not encompass local church property, which remains in the control of the local congregation. It is contended that the offices of Rector, Wardens and Vestrymen of St. Mark's Church are not vacant and that the Church hierarchy does not have the right to determine the eligibility for such offices. Additionally, they assert that the principle of compulsory deference to the determination of a hierarchical church body in property disputes has never been the law in New Jersey and that this Court should adopt the neutral principles of law approach for resolving church property disputes.

All of these contentions as well as the ancillary points raised by defendants have been considered and disposed of in our opinion in *Graves*. There we approved the hierarchical church approach utilized in *Watson v. Jones*, 13 *Wall.* 679, 20 *L.Ed.* 666 (1872). Applying that approach to this case, plaintiffs are entitled to the relief granted. As the trial judge noted, the title to all property real and personal remains in St. Mark's Church which was and still is incorporated as an affiliated member of the Protestant Episcopal Church. The Rev. Mr. Burns has been deposed as a priest of the Protestant Episcopal Church and is ineligible to serve as rector of St. Mark's. Likewise, the other individual defendants have disaffiliated themselves from the Protestant Episcopal Church and thereby automatically terminated their eligibility to hold office as Wardens and Vestrymen of St. Mark's.

As was noted in *Graves*, the individual defendants are free to disassociate themselves from the Protestant Episcopal Church and join another denomination. No court can interfere with or control such an exercise of conscience. However, they may not take the church property with them. The judgment of the trial court is affirmed for the reasons set forth herein and in our opinion in *Graves*, also decided today.

Chief Justice Wilentz and Justices Clifford, and Pollock join in this opinion.

Justice Schreiber has filed a separate dissenting opinion in which Justices Pashman and Handler join.

SCHREIBER, J., dissenting.

I dissent essentially for the same reasons expressed in my dissent in the companion case, *Protestant Episcopal Church v. Graves*, 83 *N.J.* 594 (1980), decided this day. Moreover, to the extent that the majority relies upon statutes enacted after the Act of February 17, 1829, *L.* 1828, p. 71, under which St. Mark's was reincorporated in 1832, such reliance would appear to be misplaced. The reserved power to modify a corporate charter which retroactively affects rights of stockholders *inter se* and with the corporate entity, does not appear to have come into existence until February 14, 1846. *L.* 1846, p. 16, § 6. See *Trustees of Dartmouth College v. Woodward*, 17 *U.S.* (4 Wheat.) 518, 4 *L.Ed.* 629 (1819).

Justices Pashman and Handler join in this opinion.

APPENDIX B

LETTER OPINION OF SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, DATED SEPTEMBER 11, 1979

Eugene M. Haring, Esq.
McCarter & English
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Bruce D. Shoulson, Esq.
Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan
744 Broad Street
Newark, New Jersey 07102

Re: The Diocese of Newark, et al
v. William F. Burns, et al
Docket No. C-4164-77

Dear Sirs:

In the letter opinion dated September 6, 1978, the court outlined to a considerable extent the parties and the issues to this action and entered an order restraining the defendants from engaging in certain activities as well as directing that Archdeacon Grant be allowed to conduct services. The Appellate Division modified the order as to Archdeacon Grant.

By subsequent order, the persons who were last elected as Wardens and Vestrymen of St. Marks were added as defendants.

In the aforementioned opinion, this court relied in part upon *Kelly v. McIntire*, 123 *N.J. Eq.* 351 (Ch. 1938); *The Protestant Episcopal Church v. Graves*, 161 *N.J. Super.* 230

(Ch. Div. 1978), aff'd, 167 *N.J. Super.* 563 (App. Div. 1979).

The matter is now before the court for decision after a full hearing on all issues tendered by the defendants. In substance, defendants assert that the *Graves* decision is not applicable because it is based upon statutes which are not applicable to St. Marks; under applicable law St. Marks was not part of a hierarchical church, and under *Jones v. Wolf*, – *U.S.* –, 99 *S. Ct.* –, 61 *L.Ed.2d* 775 (1979), this court must decide this case based solely on "neutral principles". The defendants urge "neutral principles" means title documents. The court will consider each of these contentions in the order stated.

The parties and the issues in *Graves, supra,* are similar to those before this court. Judge Ackerman summed up his conclusions:

> The court further holds that *Kelly* has not been undermined by recent Supreme Court decisions. Rather, *Kelly* adopted the *Watson* approach specifically approved by Justice Brennan in *Sharpsburg* and apparently approved by the court in *Milivojevich*. Under this approach a local church which is part of a hierarchical organization holds all its property in implied trust for the superior ecclesiastical authority and cannot use that property for any purpose not sanctioned by the higher authority. This is so regardless of the number of the members of the local body opposed to the higher authority, or of the source of the funds with which the property was purchased.
>
> Applying these principles to the instant case, the court finds plaintiffs entitled to the relief sought as a matter of law. Defendants are fully entitled to withdraw from

> the Diocese if they so desire, but their property is held in trust for the Diocese, and cannot be used for any purpose not sanctioned by the Diocese * * * * [161 *N.J. Super.* at 255-56].

This court does not understand that Judge Ackerman premised his decision on *N.J.S.A.* 16:1-25 and 4. It does understand that the decision is premised on the fact that Graves was deposed by the bishop and those with him withdrew from the PEC. But assuming, *arguendo,* this court's understanding is wrong, it does not change the result to be reached here. There is no dispute that a certificate was filed on July 9, 1832 with the Clerk of Essex County that stated in relevant part:

> * * * that this church embrace the privileges of the Act, entitled "An Act to incorporate religious Societies, worshipping according to the customs and usages of the Protestant Episcopal church passed [*sic*] Feb. 17, 1892 [*sic*: 1829].

The Act of 1829 provided in part:

> Sec. 5. AND BE IT ENACTED, That the qualification of voters at the annual elections shall be conformable to the constitution and principles of the Protestant Episcopal Church in New Jersey.
>
> Sec. 7. AND BE IT ENACTED, That when a vacancy shall occur in the office of minister or rector, by death, removal or otherwise, the said wardens and vestrymen (two-thirds of them concurring in the choice) may choose some fit person, duly qualified, to act as minister or rector of said church, agreeably to the constitution of the Protestant Episcopal Church in the United States of America * * * *

See *N.J.S.A.* 16A:12-10 and 7 for present statutes.

There can be no dispute that St. Marks became subject to those provisions of law in 1832. The Legislature did not impose that law on St. Marks. It embraced them. It was then a member of the Diocese of New Jersey with representatives at the General Convention.

Defendant Burns was deposed by Bishop Rath as a priest. His successor had to be chosen as provided in *N.J.S.A.* 16:12-7.

There is no dispute that all the named individual defendants as Wardens and Vestrymen withdrew from the PEC; hence became ineligible to hold office in St. Marks.

The real dispute in this controversy is not over who is entitled to the property. Legally, it is vested in St. Marks corporation. The real question is whether defendants can qualify for their respective offices. The answer to this question lies in the interpretation and application of the Constitution and Cannons [*sic*] of the Protestant Episcopal Church by the authorities therein designated. The Bishop and the Standing Committee [*sic*]. See P-40 and P-41. This court under New Jersey law accepts their determination as final. *Serbian Eastern Ortho. v. Servian [sic] Eastern Ortho.*, 106 *N.J. Super.* 22 (App. Div. 1969), certif. den. 54 N.J. 516 (1969), *cert.* den. 397 *U.S.* 961, 90 *S. Ct.* 994, 25 *L.Ed.2d* 254 (1970); *Servian [sic] Orthodox Diocese v. Milivojevich*, 426 *U.S.* 696, 96 *S. Ct.* 2372, 49 *L.Ed.2d* 151 (1976).

The reference in the majority opinion in *Jones v. Wolf, supra,* to the courts not being bound by the decision of ecclesiastical authorities has to be understood in context. The majority recognized and stated that where an ecclesiastical tribunal acts on religious qualifications based on doctrine or polity the courts are bound.

> As a corollary to this commandment, the [First -ed.] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of hierarchical church organization * * * * (Citations omitted). [61 *L.Ed.2d* at 784].

The majority then goes on to say that the states are free to select a variety of means of resolving disputes over church property and concluded by saying it could not write the law for Georgia.

It recognized that even under title paper analysis used in the neutral principles approach:

> If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy then the court must defer to the resolution of the doctrinal action issue by the authoritative ecclesiastical body. *Serbian Orthodox Diocese,* 426 *U.S.* at 709. [*Jones,* 61 *L.Ed.2d* at 785].

Justice Brennan was a member of the majority in *Jones v. Wolf, supra.* In his concurring opinion in *Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg,* 396 *U.S.* 367, 90 *S. Ct.* 499, 24 *L.Ed.2d* 582 (1970), he stated that there were at least three possible approaches:

1. *Watson v. Jones,* 13 *Wall* 679, 20 *L.Ed.* 666 (1872);
2. Neutral principles of law; and
3. Special state statutes governing church property arrangements in a manner that precludes state interference in doctrine.

New Jersey has enacted a number of statutes for use by religious corporations at their election. In *Graves,*

supra, at p. 234, it is stated St. Stephens was not incorporated under *N.J.S.A.* 16:12-1 but under 16:1-1 *et seq.*, the general religious corporation act. However, there is no dispute that St. Marks was incorporated under a special act for churches associated with the Protestant Episcopal Church.

This court concludes that based on the evidence and the testimony, plaintiff Diocese acting through the Bishop had a right to send Archdeacon Grant to perform services and has such right now.

There is no evidence that any action has been taken under *N.J.S.A.* 16:12-16 to declare the parish extinct. The court further finds that under the predecessor of *N.J.S.A.* 16:12-10 quoted above those who hold office must meet the qualifications, constitution and cannons [*sic*] of the Protestant Episcopal Church in the diocese in which the parish is located. The court concludes that none of the defendants can now meet that qualification.

This court does not find it necessary to determine whether any of the statutes enacted subsequent to the Act of 1829 are applicable to St. Marks to decide this matter.

Based on the documentary evidence and the testimony, this court concludes that the Protestant Episcopal Church in the United States of America, The Diocese of Newark, and St. Marks were all part of a hierarchical church within the concept of *Watson v. Jones, supra*, and the New Jersey cases cited in *Graves*. The court concurs with Judge Ackerman that New Jersey, unlike Maryland, has applied the implied trust concept for hierarchical churches.

In respect to the contention that the majority decision in *Jones v. Wolf, supra*, requires this court to decide the case on neutral principles, this court disagrees. There, the Georgia courts had undertaken to decide the case on neu-

tral principles of title law. The Supreme Court majority respected that choice. But the majority concluded the Georgia courts had not articulated the basis for its decision as to why the majority in a noncongregational local church should prevail and remanded.

As heretofore noted, Justice Brennan was part of the majority. The majority did not overrule *Watson v. Jones, supra,* or criticize it. As this court understands the law of New Jersey, *Watson v. Jones* is followed in New Jersey.

The court concludes that the Bishop of the Diocese has the right to designate a new Rector for the reasons set forth in exhibits and testimony and that he has deposed Rev. Burns; that none of the individuals can vote or hold office in St. Marks because of the qualifications of the constitutions and cannons [*sic*]; that the defendants have no interest in the property real or personal of St. Marks; and that counsel for plaintiffs shall submit an order fixing a time by which Rev. Burns shall vacate the rectory.

The court will sign an interim order restraining Rev. Burns from conducting services at St. Marks and prohibiting interference with the designee of the Bishop conducting such services.

Because the court has concluded that none of the individual defendants have any right to hold office, or vote, in St. Marks as a corporation and St. Marks has title to the real and personal property, it is not necessary to construe any of the instruments.

Very truly yours,

/s/ Arthur C. Dwyer
ARTHUR C. DWYER, J.S.C.

APPENDIX C

ORDER OF SUPREME COURT OF NEW JERSEY, DATED SEPTEMBER 16, 1980, DENYING PETITIONERS' MOTION FOR REHEARING

SUPREME COURT OF NEW JERSEY

M-34 SEPTEMBER TERM 1980

THE DIOCESE OF NEWARK, THE TRUSTEES OF THE EPISCOPAL FUND & DIOCESAN PROPERTIES OF THE DIOCESE OF NEWARK, AND THE RIGHT REVEREND GEORGE E. RATH,

Plaintiffs-Respondents,

vs.

WILLIAM F. BURNS, & THE RECTOR, WARDENS & VESTRYMEN OF SAINT MARK'S CHURCH IN ORANGE, N.J.,

Defendants-Movants.

No member of the Court who voted with the majority having moved the petition for rehearing is dismissed as moot.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 16th day of September, 1980.

/s/ Stephen W. Townsend
STEPHEN W. TOWNSEND
Clerk